IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16/06/2004

CORAM

The Hon'ble Mr.Justice V.KANAGARAJ

Second Appeal No.995 of 1993

1. Vaithinattar
2. Janardhanan .. Appellants

-Vs-

Sakkubai Ammal .. Respondent

Second Appeal preferred under Section 100 C.P.C., praying for the relief as stated therein.

!For appellants : Mr.Yashod Varadhan

^For respondents : Mr.V.Raghavachari

:J U D G M E N T

This Second Appeal is preferred against the judgment and decree dated 23.12.1992 rendered in A.S.No.123 of 1992 by the Court of Additional Subordinate Judge, Cuddalore, thereby reversing the judgment and decree dated 18.01.1990 rendered in O.S.No.464 of 1982 by the Court of Principal District Munsif, Kallakurichi.

2. Tracing the history of the above second appeal coming to be preferred by the plaintiff in the suit, what comes to be known is that the respondent has filed the suit for declaration and permanent injunction, wherein the suit property originally belonged to one Fathima Bi; that the plaintiff purchased the suit property with defined boundaries from the original owner, Fathima Bi under a registered sale deed dated 22.09.1969 for a valuable consideration of Rs.1275/-; that on the date of purchase, the plaintiff took possession of the suit property and is in enjoyment of the same; that the plaintiff would produce a registration copy of the sale deed dated 22.09.1969 and also a kist receipt for payment of kist for patta No.582 in which the suit property situates; that as per the sale deed, the plaintiff has purchased the suit property measuring 0.05 cents situate immediately to the west of the main road from Fathima Bi; that the title of the plaintiff over the suit property has also been perfected by adverse possession; that the

defendant who is an influential person in the village appears to have purchased some extent of the property from the plaintiff's vendor Fathima Bi subsequent to the purchase by the plaintiff, to the south of the suit property; that the defendant has put up Petrol Bunk; that the purchase of the defendant being subsequent to the plaintiff's purchase, he cannot claim any right or interest in the suit property, to the south of which alone has he acquired property from Fathima Bi; that the plaintiff's husband is away in North India on professional duty; that the plaintiff is residing at Kallakurichi; that taking advantage of the absence of the plaintiff from the suit property, the defendant appears to have attempted to enter into the suit property on 01.06.1982 and is also attempting to put up some construction adjacent to the petrol bunk; that the defendant is unlawfully trying to dig up foundation pits and to put up construction encroaching upon the suit property; that coming to know of it when the plaintiff questioned him about the impropriety of his action, the defendant refusing to heed to the request is trying to go ahead with his proposed construction over the suit property illegally, falsely claiming right therein; that the defendant claiming title to the property under the same vendor under a subsequent purchase is estopped from denying the title of the plaintiff; that if the defendant is not restrained and is allowed to put up construction over the suit property, the plaintiff will suffer heavy loss and irreparable damage; that the defendant being influential, the plaintiff is left with no other option except filing the suit for declaration of her title and for permanent injunction and hence the present suit.

3. On the contrary, the defendants/appellants in their written statement would submit that the property comprised in S.No.57/1A was originally belonged to one Fathima Bi who purchased through a registered sale deed dted 26.01.1957; that she was in peaceful possession and enjoyment of the same; that on 23.09.1969 the said Fathima Bi sold a portion of 0.05cents on the southern side in R.S.No.57/1A to the plaintiff; that subsequently on 27.11.1969 and 06.12.1969, the said Fathima Bi sold an extent of 0.06 cents and 0.15 cents respectively to one Kothandapani Naidu; that he was in peaceful possession and enjoyment of the same till he sold to his son Janarthanan on 14.12.1973 through a registered deed; that since then his son Janarthanan is in peaceful possession and enjoyment of the property purchased by him; that the plaintiff's vendor Fathima Bi filed a suit against the defendant and his son Janarthanan for declaration of title over the unsold portion of the property comprised in R.S.No.57/1A and for permanent injunction in O.S.No.29 of 1977; that the Court was pleased to appoint an Advocate Commissioner and the Advocate Commissioner measured the properties including that of the plaintiff and determined the boundaries of all the properties in R.S.No.57/1A; that as per the description of the properties in the sale deed of the plaitniff and the sale deed of his son, the suit proerty locates on the southern side of the property of his son,ie., on the extreme southern side of R.S.No.57/1A; that the said suit was dismissed by this Court; thereafter Fathima Bi preferred an appeal before the Subordinate Judge, Cuddalore in A.S.No.354 of 1978 and the appeal was also dismissed and the judgment and decree of the trial Court was confirmed; that it is false to state that the defendants are influential person and had trespassed into the said suit property; that the defendant never dug a pit for laying foundation in the suit

property; that his son is constructing within his property. On such averments, the defendants would pray to dismiss the suit with costs.

4. On such pleadings by parties, the trial court having framed the following issues for determination of the questions involved in the suit, viz., (i) whether the plaintiff is entitled to the suit property? (ii) whether the defendants have laid foundation in the suit property? (iii) whether the plaintiff has got adverse possession on the suit property? (iv) Whether the suit is barred by res judicata? (v) What relief, if any, the plaintiffs are entitled to?

5. The Trial Court has then allowed the parties to record their evidence,wherein on behalf of the plaintiff the plaintiff would examine herself as the sole witness as P.W.1 for oral evidence and would mark 4 documents as Exs.A.1 to A.4 for documentary evidence. Ex.A.1 is the sale deed dated 22.09.1969 executed by Fathima Bi in favour of the plaintiff, Ex.A.2 is the receipt dated 24.04.1979 for the fasli 1 388; Ex.A.3 series dated 04.02.1977 to 14.07.1988 for payment of kist for patta 582; and Ex.A.4 is the certified copy of the decree in O.S.No.878 of 1971 on the file of District Munsif, Kallakurichi. On the part of the defendants,the second defendant Janarthanan would be examined as D.W.1 and one Kumar as D.W.2 for oral evidence, and would mark 10 documents on their side. B.1 is the certified copy of the decree in O.S.No.29 of 1977 dated 30.06.1978' B.2 is the certified copies of Commissioner's report and plan; B.3 is the plan dated 28.11.19 89 showing Survey No.56 in Kattuvannajur village, Kallakurichi Circle; B.4 is the plan dated 30.11.1989 for Survey No.57; B.5 is the certified copies of judgment and decree dated 07.11.1979 made in A.S.No.3 54 of 1978 on the file of Subordinate Judge, Cuddalore; B.6 is the xerox copy of the plan for Survey No.35; Ex.B.7 is the xerox copy of the plan for survey No.50; Ex.B.8 is the copy of the sale deed executed by Fathima Bi in favour of Kothandapani Naidu dated 27.11.1969; Ex. B.9 is the copy of sale deed dated 06.12.1969 executed by Fathima Bi in favour of Kothandapani Naidu and Ex.B.10 is dated 14.12.1973 is the copy of the sale deed executed by by Kothandapani Naidu in favour of the second defendant.

6. Learned District Munsif, Kallakurichi, having traced the facts and circumstances of the case as pleaded by parties, and having appreciated the same in evidence, issue wise, had ultimately dismissed the suit with costs. Aggrieved, the plaintiffs have preferred an appeal in A.S.No.123 of 1992 before the Court of Subordinate Judge, Vridhachalam, and the said Court also tracing the facts as pleaded before the trial court and framing the points as below, (i) whether the appellants are entitled to the suit property? (ii) Whether it is correct to say that the land purchased by the plaintiff is situate on the southern side of S.No.57/1? (ii) Whether the plaintiff is entitled for permanent injunction and for declaration of the suit property? (iii) Whether the appeal is maintainable? and having its own discussions would ultimately allowed the appeal with costs thus reversing the judgment and decree of the trial Court and it is only against this judgment and decree dated 23.12.1992 passed by the Court of Subordinate Judge, Vridhachalam, the appellants have come forward to prefer the above second appeal and the same has been admitted by this Court for determination of the

following substantial questions of law:

(a) Had not the lower appellate Court committed a serious error in finding that the plaintiff was entitled to the suit property, especially when it is found on issue No.2, accepting the contention of the defendants, that the plaintiff's property was situate only South of the property purchased by the defendant under Ex.B.10?"

7. During arguments, the learned counsel appearing on behalf of the appellants would submit that it was a suit for declaration and recovery of possession of 5 cents of land filed by the respondent in which the appellants/defendants are none other than the father and son; that the 5 cents form part of the 4 acres of land belonging to one Fathima Bi, out of which she sold the said 5 cents of land in favour of the plaintiff on 22.9.1969; that the purchase of the property by the defendants was under two sale deeds respectively dated 27.11.1969 and 6.12.1969; that under the first sale deed 6 cents and under the second sale deed, 15 cents have been purchased; that these are the admitted facts by parties; that the contention of the plaintiff was that she was trespassing into the 0.05 cents having a petrol bunk putting up a tank into her property, thus encroaching in the same; that the plaintiff owns her property on the South.

8. The learned counsel would further submit that the trial Court decided the suit in favour of these appellants that this suit Number is 464 of 1982 whereas earlier Fathima Bi, the original owner of both properties, the appellants'/defendants' vendor filed O.S.No.29 of 197 7agaisnt the defendants contending that she also sold 0.21 cents in favour of the defendants and that they were enjoying the larger extent than what has been sold thus putting up the theory of encroachment; that the Commissioner appointed with the assistance of a Surveyor measured the suit property and filed a report on the strength of which the said suit was dismissed and even on appeal the said suit was dismissed since the appellants/defendants were found to be in possession and enjoyment of only 0.21 cents and nothing else.

9. The learned counsel would still argue to the effect that under Ex.A.1, the plaintiff has purchased 0.05 cents of land; that Exs.A2 and A3 are the kist receipts; that Ex.A.4 is the judgment in O.S,.No.8 78 of 1971 passed by the Court of District Munsif, Kallakurichi wherein the boundaries were given for the adjoining properties; that the second defendant examined himself as D.W.1 andD.W.2 is the adjacent land owner who speak about the enjoyment and construction of a petrol bunk etc.; that B.1 toB.10 have been marked as Exhibits; that Ex.B.1 is the judgment in O.S.No.29 of 1977; Ex.B.2 is the Commissioner's report; Ex.B.3 is the Field Measurement Book; Ex.B.4 is the sketch; Ex. B.5 is the judgment in A.S.No.354 of 1978; Exs.B.6 and 7 are the sketches; Exs.B.8 to B.10 are the copies of the sale deeds.

10. It is under Exs.B.8 and B.9 respectively dated 27.11.1969 and 06.12.1969 which are sale deeds,0.21 cents have been sold in favour of the defendants herein; that the trial Court saying that the case of trespass has not been established holding that the 0.05 cents held by the plaintiff was situate within the defendants' property. But the first appellate Court says

that the plaintiff is entitled to the 0 .05 cents from out of her property; that the demarcation with respect to each and every bit of land therein has been made following the procedures.

11. The learned counsel would cite Section 51 of the Transfer of Property Act which is concerned with improvements made by bona fide holders under defective titles wherein the transferee, believing in good faith that he is absolutely entitled thereto, makes any improvement and that he is evicted therefrom by any person having a better title, the person causing the eviction has to pay the estimated value of improvement to the transferee that to sell interest in the property at the then market value thereof, irrespective of the value of such improvements. On such arguments, the learned counsel would pray to allow the appeal setting aside the judgment and decree passed by the lower appellate Court.

12. In reply, the learned counsel appearing on behalf of the respondent/plaintiff would submit that the findings of the lower Courts that the respondent's property is Southern most located is not so since it stretches also on the northern part; that she has other properties on the Southern side; which have nothing to do with the suit; that even assuming that a person who purchases the property at an earlier point of time gets a better title than one purchases later which has not been vividly dealt with in paragraphs 17 and 18 of the appellate judgment; it pre-supposes that she has excluded her land and showed a portion on the southern side; that if Section 48 of the Transfer of Property Act and Exs.B.9 and B.10 and Ex.A.1 are studied in a comparative manner, they would show that the defendants have no case at all. On such arguments, the learned counsel appearing on behalf of the respondent would pray to dismiss the second appeal.

13. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both,it can be assessed that it is a suit filed by the respondent herein for declaration and permanent injunction wherein the suit property is a land measuring 0.05 cents and it is not only the plaintiff who has put up the case that she is entitled to the extent of 0.05 cents of land as claimed in the suit but also the original owner Fathima Bi who is said to have registered a case against these appellants herein in O.S.No.29 of 1977 and that the said suit got dismissed and an appeal preferred in A.S.No.354 of 1979 also got dismissed in which the appellant would come forward to say that the Commissioner was appointed and he measured the property and thereafter both the Courts have concurrently held against the case of Fathima Bi which is none other than the case of the present plaintiff, the respondent herein and, therefore, the suit is not only barred by res judi cata but also on facts becomes untenable and liable to be dismissed which has been rightly done by the trial Court, as per the case put up by the appellants herein and argued by their counsel.

14. However, the respondent/plaintiff would claim the said 0.05 cents stating especially that the defendants have encroached upon the said extent of land belonging to her and that she is sure that the said extent of the suit property which is belonging to her has been encroached upon by the

appellants/defendants and hence the suit for declaration and recovery of possession, she would also place exhibits A.1 toA.4 in favour of her case besides adducing herself oral evidence before the Court; her case is that she was not a party to the earlier proceedings in O.S.No.29 of 1977 and, therefore, there is no question of res judi cata obstructing her from claiming her legal right.

15. In this situation if an answer has to be given to the substantial question of law framed, whether the lower Court has committed serious error in finding that the plaintiff was entitled to the suit property, especially accepting the contention of the defendants that the plaintiff's property was situate South of the property purchased by the defendants under Ex.B.10. From out of the study made into the facts and the circumstance encircling the whole case as put up and projected on the part of the respondent and resisted on the part of the appellants throughout, one could easily find out that since the dispute pertains to 0.05 cents of land said to have been belonging to the plaintiff has been encroached upon by the defendants on ground and on the part of the defendants denying that there is no such encroachment, but to the purchase of the lands by them they are only in possession and enjoyment of 0.21 cents and hence since not a bit more than what has been purchased is in their possession, the case of the defendants is that the plaintiff is not entitled to anything more than what she is in possession of much less from these defendants and, therefore, it is glaring that it is the case wherein both the properties belonging to the plaintiff and the defendants and the adjoining lands to these properties particularly surrounding the location of the suit property measuring 0.05 cents have to be measured with the assistance of a qualified surveyor and with the help of the Field Measurement Book and report and sketch obtained, besides examining the Commissioner or local revenue authority, The Tahsildar or Revenue Inspector who should adduce evidence in the context of Field Measurement Book, only when the dispute would be resolved clearly and since this legal necessity has not been complied with, both the lower Courts are not in a position to arrive at a more clear decision even though both the Courts have completely searched out the facts pleaded and projected through oral and documentary evidence by both parties they have their own reasons to arrive at dissenting judgments.

16. None of the Courts below seem to have focussed its attention on the appointment of a Commission nor the parties thought of filing an application for the appointment of the same and the filing of the Commissioner report and sketc s which have been filed in O.S.No.29 of 1977 is not of much use by deciding the case in hand since the plaintiff was not a party to the said case and, therefore, fresh appointment of Commissioner in this case is highly necessary so as to decide the issue with opportunity to parties to be heard.

17. None, particularly, the plaintiff who claims that the suit property is lawfully belonging to her has been encroached upon by the defendants and annexed to their lands has filed an application for the appointment of Commissioner to measure the property and submit a report with sketch, and this Court wonders as to why the plaintiff has not resorted to file an application nor even the defendants thought of in this line, as a

result of which the Courts have to arrive at their own conclusions based on the paltry evidence placed on record and, therefore, since the best of evidence in cases of such nature could have been obtained only by appointment of a Commission and ascertainment of the extent of lands in possession and enjoyment of each party to the contest, and since this legal necessity has not been complied with, the lower Courts have not been in a position to act with the conclusive proof which could be relied upon and, therefore, it is only desirable to do this requirement which is absolutely necessary in the case in hand and, therefore, needless to mention that it is a case which has to be remanded back to the trial Court for observing this requirement in the circumstances of the case and to give a decision based on such report obtained and hence, both the judgments rendered by the trial Court and the first appellate Court have to be set aside and the case remanded for re-consideration and hence, the sole substantial question of law has to be decided in the manner and with the following result.

In result
(i) the above judgments rendered in O.S.No.464 of 1982 by the Court of Principal District Munsif, Kallakurichi dated 18.01.1990 and in A.S.No.123 of 1992 dated 23.12.1992 by the Additional Subordinate Judge, Cuddalore are hereby set aside;
(ii) the case is remanded to the trial Court for re-consideration in appointing a commissioner and measuring the suit property and the other properties surrounded by the suit property so as to ascertain the facts regarding the possession of the extent of lands by parties and to file a report with sketch and the trial Court shall decide on such additional evidence placed on record also with further opportunity for the learned counsel for both to be heard and to decide the dispute on merits and in accordance with law;
(iii) Since it is a long pending matter, further direction to expedite the proceedings is necessary in the manner afore mentioned taking up the same out of turn so as to deliver the judgment within six months from the date of receipt of this judgment;
(iv) No costs.

Index : Yes
Internet : Yes

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To
1) The Subordinate Judge, Viruchalam
2) The District Munsif, Kallakurichi
3) The Record Keeper, VR Section,High Court, Madras.